Foo Yoke Foon v Public Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–276 OF 1996
SHAIK DAUD, NH CHAN AND SITI NORMA YAAKOB JJCA
31 MAY 2000

Civil Procedure *— Interest — Order for sale under National Land Code 1965 — Increase in interest rate — Allegation that sum demanded was in excess of what was due — Charge document provided for variation of interest and penalty interest — Whether interest was unilaterally varied — Whether any 'cause to the contrary' proved — National Land Code 1965 s 256(3)*

Land Law *— Sale of land — Order for — Variation of interest — Demand of sum in excess of what was due by increasing interest rate — Whether 'cause to the contrary' — National Land Code 1965 s 256(3)*

This was an appeal from the decision of the High Court which had granted an order for sale of a third party charge of property belonging to the appellant which had been charged to the respondent. The appellant contended that the respondent had demanded a sum in excess of what was due by increasing the interest rate. The notice of the change of interest rate was not given to the appellant.

Held, dismissing the appeal:

(1) The court found that the appellant had not established sufficient 'cause to the contrary' within s 256(3) of the National Land Code 1965 to warrant the court to disturb the finding of the judge to refuse the application for sale. The charge documents made provisions for variation of interest at the instance of the respondent and they also provided for penalty interest. It was not disputed that the charge documents were executed by the appellant in the presence of his own solicitors. Therefore he could not be heard to say that the variation of interest by the respondent was a unilateral act (see p 730C–D, G).

(2) In the light of the lack of evidence that the respondent had given notice to the appellant of the variation of the interests, the court ordered that the amount due reflect a claim of interest at 18%pa as provided by the charge (see p 730G-H).

[Bahasa Malaysia summary

Ini merupakan satu rayuan daripada keputusan Mahkamah Tinggi yang telah memberikan satu perintah untuk jualan satu gadaian ketiga hartanah kepunyaan perayu yang telah digadaikan kepada responden. Perayu menegaskan bahawa responden telah menuntut satu jumlah yang melebihi apa yang kena dibayar dengan meningkatkan kadar faedah. Notis penukaran kadar faedah telah tidak diberikan kepada perayu.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah mendapati bahawa perayu telah tidak menetapkan dengan secukupnya 'sebab yang bertentangan' (cause to the contrary) di dalam lingkungan maksud s 256(3) Kanun Tanah Negara 1965 bagi mewajarkan mahkamah menggangu keputusan hakim tersebut untuk menolak permohonan untuk jualan. Dokumen-dokumen gadaian telah membuat peruntukan-peruntukan untuk perubahan faedah di atas permintaan responden dan mereka telah juga memperuntukan faedah penalti. Adalah tidak dipertikaikan bahawa dokumen-dokumen gadaian tersebut telah disempurnakan oleh perayu dalam kehadiran peguamcaranya yang tersendiri. Oleh itu, beliau tidak boleh memperkatakan bahawa perubahan faedah oleh responden merupakan satu perbuatan sepihak (lihat ms 7320–D, G).

(2) Dalam ketiadaan keterangan bahawa responden telah memberikan notis kepada perayu mengenai perubahan faedah, mahkamah memerintahkan bahawa jumlah yang kena dibayar menunjukkan satu tuntutan faedah pada kadar 18% setahun seperti mana yang diperuntukkan oleh gadaian tersebut (lihat ms 730G-H).]

Notes

For cases on order for sale under the National Land Code 1965, see 2(1) and 8 *Mallal's Digest* (4th Ed, 1998 and 1999 Reissues) paras 2398 and 3030–3101 respectively.

Legislation referred to

National Land Code 1965 s 256(3)

Appeal from: Originating Summons No 24–3 of 1995 (High Court, Shah Alam)

Wong Kam Leong (*Wong Kam Leong & Partners*) for the appellant.
Satish a/l Vasudevan Nair (*Gulam & Wong*) for the respondent.

Shaik Daud JCA (delivering judgment of the court): This was an appeal from the decision of the High Court which had granted an order of sale of a third party charge of property belonging to the appellant which had been charged to the respondent. It is not disputed that the land belonging to the appellant, HS(D) 24077, No PT 23065 Mukim Kuala Lumpur ('the said land') was charged to the respondent as consideration for banking facilities to a company called Bekal Tulin Sdn Bhd of which the appellant was at all material time one of its directors.

On the default of repayment of the banking facilities, the respondent issued an originating summons for an order of sale of the charged property. The appellant thereupon issued a summons in chambers for an order that the originating summons be struck out. The learned judge dismissed the

application to strike out and allowed the originating summons and ordered the sale of the property. At the hearing of this appeal learned counsel for the appellant abandoned the appeal against the striking out order but proceeded only on the appeal against the order of sale.

We found that there was only one issue which merited our consideration. It was the contention of the learned counsel for appellant, that the demand was defective in that the respondent had demanded a sum in excess of what was due. It was contended that the letter of offer of the facilities provided for only 10% of interest but the letter of demand asked for 14.5% on the RM1m overdraft facility and 20% on the excess of RM410,282.04.

We found that while it is true that the letter of offer provided for a 10% interest a perusal of the charge documents showed that the facilities were granted together with interest at 18% pa. The charge documents also made provisions for variation of interest at the instance of the respondent and they also provided for penalty interest. It is not disputed that the charge documents were executed by the appellant in the presence of his own solicitors. Therefore, he could not be heard to say that the variation of interest by the respondent was a unilateral act.

While we agree with the submission of the counsel for the respondent that cl 3 of the charge document provides for variation of interest and also for penalty of interest to be imposed, under cl 1(A), it cannot be gainsaid that in order for the respondent to do either or both, written notice must be given to the principal borrower and the chargor. In the present appeal it was submitted and we found it to be so, that the affidavit of the appellant sworn on 27 February 1992 categorically averred at para 14 that there was no notice of the change of interest, given to him. In the affidavit in reply to this affidavit, the respondent never denied this averment. From this it can be safely inferred that no such notice was given to the appellant. This is fortified by the submission of the learned counsel for the respondent before us that if no notice was given then the court can order a re-adjustment of the interest.

In the present appeal we found that the appellant had not established sufficient 'cause to the contrary' within s 256(3) of the National Land Code 1965, to warrant us to disturb the finding of the learned judge to refuse the application for sale. We had dismissed the appeal with costs, but in the light of the lack of evidence that the respondent had given notice to the appellant of the variation of the interest, we ordered that the amount due reflect a claim of interest at 18% pa as provided for by the charge. We also ordered the deposit to go to the account of taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar